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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

T.B., Robert Brenneise, and Allison Brenneise, Plaintiffs, v. SAN DIEGO UNIFIED SCHOOL DISTRICT, Defendant.	Case No. 08 CV 0028 WHQ WMc (Consolidated with 08 CV 00039 WQH WMc) **SAN DIEGO UNIFIED SCHOOL DISTRICT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR CERTIFICATION TO THE NINTH CIRCUIT OF THE COURT'S ORDER DENYING ITS MOTION TO DISMISS PLAINTIFFS' FOURTH CLAIM FOR RELIEF**
SAN DIEGO UNIFIED SCHOOL DISTRICT, Plaintiff, v. T.B., a minor, Allison Brenneise and Robert Brenneise, his parents, Steven Wyner, and Wyner and Tiffany, Defendants.	Date: August 18, 2008 Time: 9:00 a.m. Courtroom: 4 Judge: Hon. William Q. Hayes Trial: None Set Complaint Filed: January 4, 2008 **NO ORAL ARGUMENT UNLESS REQUESTED BY COURT**

I. EARLY RESOLUTION OF THE QUESTION OF THE AVAILABILITY OF FEES FOR COMPLIANCE COMPLAINTS WILL MATERIALLY ADVANCE THIS LITIGATION

In these consolidated actions, all the parties to this litigation have asked this Court to determine their rights and obligations with respect to whether attorneys' fees are available for the filing of a compliance complaint with the California Department of Education ("CDE") on behalf of a special education student against a school district. This issue is raised by T.B., Allison Brenneise and Robert Brenneise (collectively "the Brenneises") as their Fourth Claim for Relief in which they seek to recover fees against the San Diego Unified School District ("District") for filing such a complaint (the "Brenneise Case"). It is also plead in the District's Third Cause of Action, in which the District seeks declaratory relief against T.B., Allison Brenneise, Robert Brenneise, and their attorneys Steven Wyner and Wyner and Tiffany as to whether or not the obligation to pay such fees exists as a matter of law (the "District Case").

The dispute on these claims arises because there has been substantial changes in the law since the Ninth Circuit decided this issue eight years ago in *Lucht v. Molalla River School District*, 225 F.3d 1023 (9th Cir. 2000). In *Lucht*, the Ninth Circuit found that attorneys' fees were available under 20 U.S.C. section 1415(i)(3) of the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq. ("IDEA") for work done in filing a successful compliance complaint with a state educational agency ("SEA") under the United States Department of Education regulations issued at 34 C.F.R. sections 300.660-662. As more fully analyzed in the District's moving papers supporting its Motion to Dismiss Plaintiffs' Third and Fourth Claims (Document No. 15 and 20), fully incorporated herein by reference, since 2000 when the Ninth Circuit found fees were available under the IDEA for those who achieved prevailing party status through the filing of a successful compliance complaint, the IDEA was reauthorized in 2004, effective July 1, 2005, resulting in significant changes to section 1415(i). More compelling, the United States Department of Education ("DOE") thereafter issued new implementing regulations, in August 2006, confirming that it did not intend to create an entitlement to attorneys' fees for compliance complaints filed pursuant to the regulatory process it created, which are purely a creature of those regulations, and never even once mentioned in

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the IDEA.

In further support, in 2001, in *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Human Res.,* 532 U.S. 598 (2001), the Supreme Court issued a landmark ruling regarding the availability of attorneys' fees for prevailing plaintiffs under civil rights law, which the Ninth Circuit has subsequently adopted and explicitly applied to the IDEA. (*Shapiro v. Paradise Valley Unified School District*, 374 F.3d 857 (9th Cir. 2004).) This significantly changed prior law, which permitted the award of attorneys' fees when a party's actions served as the "catalyst" for a desired change of conduct, regardless of whether or not that change was the product of any adjudicatory or judicial proceedings. Under *Buckhannon* and its progeny, a plaintiff is not entitled to a fee award unless the victory that he achieved bears a "judicial imprimatur," requiring that a court or other quasi-judicial body must have resolved the claims on the merits in his favor. There is no real dispute here that an SEA such as the CDE is not a court or quasi-judicial agency; there is also no real dispute that compliance complaints are not resolved through an adjudicatory process. Therefore, *Buckhannon* and *Shapiro* now precludes eligibility for fees awards arising from changes in conduct brought about through alternative mechanisms, such as the CRP process, not bearing any judicial imprimatur.

Moreover, at least one other Circuit Court of Appeals and several District Courts have disagreed with or declined to follow or extend *Lucht*, and further found that fees are not available under the IDEA for the filing of a regulatory compliance complaint. See, *Vultaggio ex rel. Vultaggio v. Board of Educ.*, 343 F.3d 598 (2nd Cir 2003); *Vultaggio ex rel. Vultaggio v. Board of Educ., Smithtown Central School Dist.*, 216 F.Supp.2d 96 (E.D.N.Y. 2002); *Melodee H. v. Department of Educ.*, 374 F.Supp.2d 886 (D. Haw 2005); *Johnson ex rel. Johnson v. Fridley Public Schools*, 2002 WL 334403 (D. Minn. 2002) (court ruled that their complaint seeking attorney's fees for work in connection with the Complaint Resolution Process ("CRP") failed as a matter of law); *Megan C. v. Independent School Dist. No. 625*, 57 F. Supp. 2d 776, (D. Minn. 1999) (court granted summary judgment in an action for attorney's fees under the IDEA holding that it lacked jurisdiction because the plaintiffs' CRP did not constitute an "action or proceeding" under the IDEA). In fact it would appear no other circuit has followed its

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reasoning in this regard.

As a result of these changes in the law, the issues of whether fees are available remains unsettled, and is the subject of ongoing controversy between parents and students on the one hand and school districts on the other. (Decl. of J. Cias). For all these reasons, the District Court should certify its ruling on the District's motion to dismiss the Brenneises' Fourth Claim for Relief for an interlocutory appeal to the Ninth Circuit.

II. THE CRITERIA FOR CERTIFICATION HAVE BEEN MET

A direct appeal lies from an otherwise nonappealable interlocutory order if permission is granted pursuant to 28 U.S.C. section 1292(b). Pursuant to section 1292, subsection (b):

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Section 1292 identifies three factors that must be present in order for the court to certify an appeal. While all criteria must be met, "[i]t is equally important, however, to emphasize the duty of the district court and of our court as well to allow an immediate appeal to be taken when the statutory criteria are met…." *Ahrenholz v. Board of Trustees of University of Illinois*, 219 F.3d 674, 675-677 (7th Cir. 2000) (citing *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605 (7th Cir. 2000).

A. The Ruling Involves a Controlling Issue of Law on Which There is a Substantial Difference of Opinion

First, the issue to be certified must involve a controlling issue of law. An issue is "controlling" if "resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir.

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1982). Termination of the litigation is not required to satisfy this element. *Watson v. Yolo County Flood Control and Water Conservation Dist.*, Slip Copy, 2007 WL 4107539, *3 (E.D.Cal. 2007) ("*Watson*") (citing *Id.*) Here, the issue of whether attorney's fees are available under the IDEA for a compliance complaint is a pure question of law which will resolve at least two of the causes of action between the parties. In fact, the District brought the question to the Court's attention by way of a claim for declaratory relief, which simply seeks a determination of this issue of law.

Second, there must be substantial ground for difference of opinion on the issue. A party's strong disagreement with the court's ruling is not sufficient for there to be a "substantial ground for difference;" the proponent of an appeal must make some greater showing. *Kern-Tulare Water Dist. v. Bakersfield*, 634 F.Supp. 656, 667 (E.D.Cal.1986), *aff'd in part and rev'd in part on other grounds*, 828 F.2d 514 (9th Cir.1987). Moreover, a "substantial ground for dispute ... exists where a court's challenged decision conflicts with decisions of several other courts." *See APCC Services, Inc. v. AT & T Corp.*, 297 F.Supp.2d 101, 107 (D.D.C.2003).

Here, not only has there has been a significant change in the law since the Ninth Circuit previously considered this issue, the *Lucht* decision conflicts with decisions in the Second Circuit and several District Courts in the Eighth and Ninth Circuits. See, *Vultaggio ex rel. Vultaggio v. Board of Educ.*, 343 F.3d 598, 601-602 (2nd Cir 2003) (concurring with District Court below, Court of Appeals held that state Complaint Review Procedure (CRP) pursuant to regulations promulgated by the U.S. Department of Education was not an "action or proceeding" within meaning of IDEA's attorney fee provision); *Vultaggio ex rel. Vultaggio v. Board of Educ., Smithtown Central School Dist.*, 216 F.Supp.2d 96 (E.D.N.Y. 2002); *Melodee H. v. Department of Educ.*, 374 F.Supp.2d 886 (D. Haw 2005); *Johnson ex rel Johnson v. Fridley Public Schools*, 2002 WL 334403 (D. Minn. 2002) (court ruled that their complaint seeking attorney's fees for work in connection with the Complaint Resolution Process ("CRP") failed as a matter of law); *Megan C. v. Independent School Dist. No. 625*, 57 F. Supp. 2d 776 (D. Minn. 1999), (court granted summary judgment in an action for attorney's fees under the IDEA holding that it lacked jurisdiction over the plaintiffs' complaint because the plaintiffs'

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CRP did not constitute an "action or proceeding."). There is therefore more than just a party's disagreement with the Court's ruling involved here; there is a substantial ground for difference of opinion on this issue. *See e.g., Kotrous v. Goss-Jewett Co. of Northern California, Inc.*, 2005 WL 2452606, *4 (E.D.Cal. 2005.) ("The Supreme Court's skepticism in [one case] in conjunction with the alternate interpretation of Ninth Circuit precedent by the district court in [another case] demonstrate that reasonable jurists may differ in determining the standing requirements for a CERCLA contribution claim. While two other district courts have agreed with this court's interpretation of Ninth Circuit precedent, the issue is by no means unambiguous. Thus, a substantial ground for difference of opinion exists.").

Because this Court is bound by Ninth Circuit precedent, it was constrained to apply *Lucht* even if it may have entertained serious doubts as to its ongoing viability. The same will likely be true each time this issue presents itself in the District Courts within the Ninth Circuit. In order for this issue to be resolved, it must be resolved by review of the Ninth Circuit.

B. Resolution of the Issue Will Materially Speed the Litigation

Third, an interlocutory appeal must be likely to materially speed the termination of the litigation. This factor is linked to whether an issue of law is "controlling" in that the court should consider the effect of a reversal by the court of appeals on the management of the case. *See In re Cement Antitrust Litig.*, 673 F.2d at 1026. The term "controlling" has been construed broadly and may reach such issues as "needless expense and delay." *Batt v. City of Oakland*, Slip Copy, 2006 WL 2925681, at *2-3 (N.D.Cal. 2006) (citing *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir.1996); *see also*, *Valdovinos v. McGrath*, 2007 WL 2023505, *3 (N.D. Cal. 2007) ("The resolution of this issue on appeal could materially affect the outcome of litigation by saving time and expense for the litigants and the Court if the Court's order were reversed"). Further, as stated above, it is not necessary that resolution of the issue terminate the litigation entirely. (*Watson*, supra, at *3.) Moreover, "[b]ased upon the importance of this issue in determining the jurisdiction of the court, resolution of this issue by the Ninth Circuit will materially speed the termination of litigation." *Kotrous, supra,* at *4. Thus, where resolution of this jurisdictional issue will prevent needless expense and delay, as is the case here,

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certification of the decision is proper.

Here, certification would certainly speed the termination of litigation regarding attorney's fees entitlement following a compliance complaint by resolving these claims, particularly to the extent such is required to vest jurisdiction in the District Court. Further, should the Ninth Circuit reverse this Court's order on the substantial grounds listed above, this Court would never have to engage in the detailed factual inquiry required to determine the degree of the Brenneises' success on the Compliance Complaint and reasonableness of the amount of fees sought in order to determine what, if any, are their recoverable attorneys' fees. If, on the other hand, the Ninth Circuit affirms, it is likely that the parties would settle the compliance fees causes of action. In both instances, it would also avoid the cost associated with litigating the amount of fees owed to its conclusion. Further, since the Brenneises have moved out of state, the only issues likely to be involved in a settlement of the entire litigation are financial, and primarily attorney's fees. (Sutherland Decl., 1). Thus, resolution of this issue by the Ninth Circuit will not only dispose of two claims in the cross-filings, but also has the potential to materially advance the parties towards settlement on all claims.

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Moreover, there is no trial set, and no stay requested, so certification of this appeal will not cause any delay whatsoever. *See e.g., Shurance v. Planning Control Intern, Inc.*, 839 F.2d 1347, 1348 (9th Cir. 1988) (refusing to hear certified appeal of an interlocutory appeal where appeal probably could not be completed before the trial already scheduled to begin shortly). Furthermore, as analyzed above, resolution of this question on appeal does not involve or require development of any factual record or affect judicial resolution of the other pending claims should settlement not occur. To the contrary, certification of this appeal will dispose of at least two of the seven causes of action pending in this matter, and could also significantly move the parties towards settlement.

Finally, it is also worth noting that resolution of this issue serves judicial economy and promotes uniformity in the law. The issue raised by this motion affects parents and school districts throughout California and the rest of the Ninth Circuit, and could advance the resolution a number of disputes that are in litigation or likely to wind up in litigation on this issue. (Decl. of J.Cias; *see also, Ovando v. City of Los Angeles*, 92 F.Supp.2d 1011, 1025 (C.D. Cal. 2000) (in granting certification, the court took notice of the fact there were a number of other similar actions before it and other courts in the district, such that certification would not only effectuate judicial economy, but also uniformity in the application of the law).) Therefore, all the criteria for certification have been met, and this motion should be granted.

C. Because the District is Immune From Litigation Under the Fourth Claim for Relief, It is Entitled to Interlocutory Review

The District raised 11th Amendment immunity as a defense in seeking dismissal of the Brenneises' Fourth Claim for relief. (Document No 20). A district court's denial of a claim of immunity, to the extent that it turns on an issue of law, is an appealable "final decision" for purposes of appeal, notwithstanding the absence of a final judgment. *Way v. County of Ventura*, 348 F.3d 808, 810 (9th Cir. 2003). In *Way*, the Ninth Circuit explained "[i]t is well-settled that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Ibid.* (*citing Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)).

Moreover, a school district has the benefit of the "collateral order doctrine" to appeal a decision denying its claim to Eleventh Amendment immunity. *Will v. Hallock*, 546 U.S. 345, 349-350 (2006). In *Will*, the Supreme Court explained:

> Prior cases mark the line between rulings within the collateral order doctrine and those outside. On the immediately appealable side are orders rejecting absolute immunity, *Nixon v. Fitzgerald*, 457 U.S. 731, 742, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982), and qualified immunity, *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). A State has the benefit of the doctrine to appeal a decision denying its claim to Eleventh Amendment immunity, *Puerto Rico Aqueduct, supra*, at 144-145, 113 S.Ct. 684.

Will, at 351. Although the District raised this immunity issue in its Motion to Dismiss, the Court failed to rule on it, effectively rejecting its argument.

Because district court orders rejecting absolute immunity and qualified immunity are immediately appealable under the "collateral order doctrine," this Court's ruling in that regard

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should be as well *Ibid.* In fact, a district court's denial of a claim of qualified immunity, to the extent it turns on an issue of law, is an appealable final decision, notwithstanding the absence of a final judgment; this is so even where the denial is in the context of a motion to dismiss or for summary judgment. *Luna v. Pico*, 356 F.3d 481 (2d Cir. 2004); see also, *Behrens v. Pelletier,* 516 U.S. 299, 307 (1996). In *Luna*, the court explained: "This Court has jurisdiction to hear defendants' appeal because "a district court's denial of a claim of qualified immunity, to the extent it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Thus, immediate review is available here as well and this motion should be granted.

III. CONCLUSION

In sum, this request should be granted because it involves a controlling, abstract question of law that will dispose of a cause of action brought in both the Brenneise Case and the District Case, and could have a significant impact advancing the termination of the litigation. An appeal of this issue at this juncture would foster settlement and head off protracted, costly litigation not just between these parties, but between many parties in the future. *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605 (7th Cir.2000). Because it is an abstract issue of law that was litigated on the pleadings, it is suitable for determination by an appellate court without a trial record. *Id.* For all these reasons, the District requests that this Court certify to the Ninth Circuit the issue of whether or not attorney's fees and costs are available under 20 U.S.C. section 1415(i)(3) to a prevailing party following a compliance complaint to a state educational agency under 34 C.F.R. sections 300.660-662.

DATED: July 11, 2008

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